85-395

No. ____

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

Carl Albert Collins ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* JOHN STEVEN CLARK
Arkansas Attorney General

BY: CLINT MILLER
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Petitioner

* *Counsel of Record*

QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH CIRCUIT COURT'S GRANTING OF FEDERAL HABEAS CORPUS RELIEF TO RESPONDENT IGNORED A STATE PROCEDURAL BAR.

II.

WHETHER THE EIGHTH CIRCUIT'S INTERPRETATION OF PECUNIARY GAIN AS AN ELEMENT OF THE CRIME IN ROBBERY-MURDER CASES ELIMINATES PECUNIARY GAIN AS AN AGRA-VATING CIRCUMSTANCE.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii-v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3-4

REASONS FOR GRANTING THE WRIT ii

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT'S GRANTING OF FEDERAL HABEAS CORPUS RELIEF IGNORES A STATE PROCEDURAL BAR 5

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERPRETATION OF PECUNIARY GAIN AS AN ELEMENT OF THE CRIME IN ROBBERY-MURDER CASES ELIMINATES PECUNIARY GAIN AS AN AGGRAVATING CIRCUMSTANCE 8

CONCLUSION 16

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

CASES: Page

Barclay v. Florida, 463 U.S. 939 (1983) 11, 12, 13, 15

Clary v. State, 33 Ark. 561, 563 (1878) 9

Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985) 1, 3, 4, 5, 7, 12, 13, 14, 15

Collins v. Lockhart, No. PB-C-81-271 (E.D. Ark. 1983) 1, 5

Collins v. Lockhart, 545 F. Supp. 83 (E.D. Ark. 1982) 3, 4, 5

Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1976), *vacated and remanded*, 429 U.S. 808 (1976) 6, 7

Cook v. State, 369 So.2d 1251 (Ala. 1979) 11

Engle v. Isaac, 456 U.S. 107 (1982) 5, 7, 8

Furman v. Georgia, 408 U.S. 238 (1972) 11

Giles v. State, 261 Ark. 413, 549 S.W.2d 479, *cert. denied*, 434 U.S. 894 (1977) 13, 14, 15

Godfrey v. Georgia, 446 U.S. 420 (1980) 7, 11, 14

Gregg v. Georgia, 428 U.S. 153 (1976) 11

Haley v. State, 49 Ark. 147, 4 S.W. 746 (1886) 9

Henderson v. State, 281 Ark. 406, 664 S.W.2d 451 (1984) 14-15

Leatherwood v. State, 435 So.2d 645 (Miss. 1983) *cert. denied*, ____ U.S. ____, 104 S.Ct. 1445, 79 L.Ed.2d 772 (1984) 11

Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983) 13

Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), *cert. denied*, 450 U.S. 1035 (1981) 11

Neal v. State, 274 Ark. 217, 623 S.W.2d 191 (1981) 13

Pulliam v. Georgia, 236 Ga. 460, 224 S.E.2d 8, *cert. denied*, 428 U.S. 911, *reh'g denied*, 429 U.S. 874 (1976) 11

Raulerson v. State, 420 So.2d 567 (Fla. 1982), *cert. denied*, 463 U.S. 1229, *reh'g denied*, 463 U.S. 1249 (1983) 11

Ruiz v. Lockhart, 754 F.2d 254 (8th Cir. 1985), *petition for cert. filed*, 53 U.S.L.W. ____, (U.S. June 28, 1985) (No. 84-2027) 6

Scifres v. State, 228 Ark. 486, 308 S.W.2d 815 (1958) 9

State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, *cert. denied*, 461 U.S. 971, *reh'g denied*, 463 U.S. 1236 (1983) 11

State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) 11

State v. Knighton, 436 So.2d 1141, (La. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984) 11

State v. Soward, 83 Ark. 264, 103 S.W. 741 (1907) 9

Ulster County Court v. Allen, 442 U.S. 140 (1979) 5

Wainwright v. Sykes, 433 U.S. 72 (1977) 5, 6, 7, 8

Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980) 6

Williams v. State, 274 Ark. 9, 621 S.W.2d 686, *cert. denied*, 459 U.S. 1042 (1981) 13

Zant v. Stephens, 462 U.S. 862 (1983) 7, 11, 12, 13

STATUTES:

28 U.S.C. §1254(1) 2

28 U.S.C. § 2254 3

Ark. Stat. Ann. § 41-2725 (Repl. 1977) 6, 8

Ark. Stat. Ann. § 41-4710-12 (Supp. 1973) 3

Ark. Stat. Ann. § 41-4702(A) (Supp. 1973) 9

Ark. Stat. Ann. § 41-3601 (Repl. 1964) 9

CONSTITUTIONAL PROVISIONS:

Eighth Amendment 2

Fourteenth Amendment 2

No. ____

In the
Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

Carl Albert Collins ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), and is reprinted in Appendix A to this petition. Appendix A also includes the Eighth Circuit's judgment in the case and an order denying rehearing, issued on April 24, 1985. The Memorandum and Order of the United States District Court for the Eastern District of Arkansas denying respondent Collins' habeas corpus petition is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1985. Petitioner Lockhart's petition for rehearing was denied on April 24, 1985. On May 28, 1985, Justice Blackmun granted an extension of time until August 22, 1985, for petitioner to file a petition for writ of certiorari. On August 6, 1985, Justice Blackmun granted a further extension until September 6, 1985.This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> "[N]or cruel and unusual punishment inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

In 1981, the United States District Court for the Eastern District of Arkansas properly assumed jurisdiction of this habeas corpus action pursuant to 28 U.S.C. § 2254.

In 1974, respondent Collins was convicted of capital murder in the Circuit Court of Washington County, Arkansas and was sentenced to death. Collins had been charged with murdering an elderly man, John Welch, in the course of a robbery. Collins shot Welch with a shotgun when Welch came to the aid of his wife, whom Collins was robbing. Pursuant to Arkansas' statutory capital sentencing procedure then in effect, Ark. Stat. Ann. § 41-4710-12 (Supp. 1973), the jury found three aggravating circumstances: (1) that the defendant had been previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) that the defendant in the commission of the capital felony knowingly created a great risk of death to one or more persons in addition to the victim; and (3) that the capital felony was committed for pecuniary gain. The jury found one mitigating circumstance: the youth of the defendant at the time he committed the capital felony. After finding the aggravating circumstances and the mitigating circumstance, the jury weighed them pursuant to § 41-4710(d) (i-ii) and sentenced Collins to death.

The procedural history of this case, outlined on page 260 of 754 F.2d (*See* Appendix A), is extremely complex. By the time respondent Collins filed his habeas corpus petition in federal district court, his case had been reviewed three times by the Arkansas Supreme Court and once by this Court. In *Collins v. Lockhart*, 545 F.2d 83 (E.D. Ark. 1982) the District Court rejected all of Collins' claims of constitutional violations and dismissed the petition. In rejecting Collins' Eighth Amendment claim that the aggravating circumstance of pecuniary gain was unconstitutionally applied in his case, the District Court held that the application of pecuniary gain in Collins' case was not unconstitutionally

vague and did not violate the Double Jeopardy Clause of the Fifth Amendment. *Collins*, 545 F.Supp. at 91. Collins appealed to the Eighth Circuit, which ordered the District Court to hold his habeas corpus petition in abeyance until he could exhaust all his state remedies for all his constitutional claims. After Collins exhausted his state remedies, the District Court again dismissed his petition in an unpublished opinion with no comment on Collins' Eighth Amendment claim except to note that the issue had been decided in the previous proceeding. (Attached as Appendix B)

The Eighth Circuit reversed the District Court on its dismissal of respondent Collins' Eighth Amendment claim and ordered that the writ of habeas corpus be granted unless the State retries him. The Eighth Circuit held that pecuniary gain repeated an element of the underlying offense and therefore did not narrow the category of persons eligible for the death penalty. *Collins v. Lockhart*, 754 F.2d 258, 261-68 (1985) The Eighth Circuit also held that no procedural bar existed to prevent it from reaching Collins' Eighth Amendment claim. Collins made an objection to the trial court's giving the jury pecuniary gain as an aggravating circumstance, but did not argue the point on his direct appeal to the Arkansas Supreme Court. In reversing the District Court's finding of a procedural bar, the Eighth Circuit found that the issue was not barred from the federal habeas corpus review because, in its view, the Arkansas Supreme Court had considered and rejected Collins' Eighth Amendment claim on its merits. *Collins*, 754 F.2d at 262.

On April 24, 1985, the Eighth Circuit denied rehearing in *Collins v. Lockhart*. The Eighth Circuit has stayed its order that Collins be retried pending disposition of this petition.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT COURT'S GRANTING OF FEDERAL HABEAS CORPUS RELIEF IGNORES A STATE PROCEDURAL BAR.

In the instant case the Eighth Circuit Court of Appeals held that respondent Collins' Eighth Amendment claim was not barred from consideration by a federal court on habeas corpus review. The Eighth Circuit held that the State violated Collins' Eighth Amendment rights by permitting the jury that sentenced him to death to consider pecuniary gain as an aggravating circumstance. Because the State had to show respondent Collins committed murder during a robbery in order to convict him of capital murder, the Eighth Circuit concluded that pecuniary gain considered by the jury as an aggravating circumstance duplicated an element of the murder itself and therefore did not genuinely narrow the class of defendants which should receive the death penalty. In his brief to the Eighth Circuit petitioner Lockhart argued that the Eighth Amendment issue raised by Collins could not be considered by federal courts on habeas corpus review because of the principles set forth in *Wainwright v. Sykes*, 433 U.S. 72 (1977) and *Engle v. Isaac*, 456 U.S. 107 (1982). Earlier, at the first level of habeas corpus review, the United States District Court for the Eastern District of Arkansas had stated twice that Collins had never raised the issue before the Arkansas courts. *Collins v. Lockhart*, 545 F. Supp. 83, 91 (E.D. Ark. 1982) *Collins v. Lockhart*, unpublished memorandum and order, No. PB-C-81-271 (E. D. Ark. 1983) (Appendix B)). Specifically, the Eighth Circuit found that the Arkansas Supreme Court had actually passed on the merits of the federal question and, thus, that no procedural bar existed by virtue of *Ulster County Court v. Allen*, 442 U.S. 140 (1979). *Collins*, 754 F.2d at 262. The Eighth Circuit decided

this point in *Collins* based on its analysis of the same argument made by the petitioner in *Ruiz v. Lockhart*, 754 F.2d 254, 256-57 (8th Cir. 1985), *petition for cert. filed*, 53 U.S.L.W. ____ (U.S. June 28, 1985) (No. 84-2027).

Wainwright v. Sykes, supra, holds that a defendant's failure to properly object to a claimed judicial error (even one of constitutional dimension) at a state trial constitutes an adequate and independent state ground sufficient to uphold a conviction against a claim of constitutional error if the State has a contemporaneous objection rule, the State enforces its contemporaneous objection rule, and the defendant fails to show cause for and prejudice from not having complied with the contemporaneous objection rule. Arkansas requires a contemporaneous objection to preserve an alleged error for appellate review. *See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In all criminal cases where a defendant receives either a death sentence or life imprisonment, the Arkansas Supreme Court reviews the entire record for all errors prejudicial to the rights of the defendant. Ark. Stat. Ann. § 43-2725 (Repl. 1977).

At trial, respondent Collins objected to the trial court's instruction to the jury that pecuniary gain was an aggravating circumstance. (Trial Transcript 256-57) Collins' ambiguous objection was not phrased in explicit Eighth Amendment terms. Collins did not argue the point on appeal. In its brief on direct appeal, the State barely touched on the merits of the objection to the pecuniary gain instruction. The State's argument concerning the pecuniary gain instruction had nothing to do with the Eighth Amendment's requirement that aggravating circumstances genuinely narrow the class of convicted defendants eligible for the death penalty.

In its original opinion rendered when Collins directly appealed his capital murder conviction, *Collins v. State*, 259 Ark. 8, 531 S.W.2d 13 (1976), *vacated and remanded*, 429 U.S. 808 (1976), the Arkansas Supreme Court held against

Collins on all his contentions. The Arkansas Supreme Court did not hold on any Eighth Amendment issues. The Arkansas Supreme Court, in two sentences, stated that it had examined the trial record for all possible errors, pursuant to Ark. Stat. Ann. § 43-2725, and found none. *Collins*, 259 Ark. at 15, 531 S.W.2d at 17. The Eighth Circuit held that in this opinion when the Arkansas Supreme Court stated that it had examined the trial record for all possible errors, the Arkansas Supreme Court had decided on its merits the Eighth Amendment question Collins presented to the Eighth Circuit. *Collins*, 754 F.2d at 262 (Appendix A).

The Eighth Circuit's holding on this point violates the principles of finality and comity set forth in *Wainwright v. Sykes*, *supra*, and *Engle v. Isaac*, *supra*. In the instant case the Eighth Circuit decided Collins' Eighth Amendment claim despite a total lack of any indication that the Arkansas Supreme Court, in fact, had considered the Eighth Amendment issue the Eighth Circuit decided. The Eighth Circuit's own analysis of Collins' Eighth Amendment claim shows it is virtually impossible that the Arkansas Supreme Court actually considered Collins' Eighth Amendment argument.

In *Collins* the Eighth Circuit cites *Godfrey v. Georgia*, 446 U.S. 420 (1980) and *Zant v. Stephens*, 462 U.S. 862 (1983) as the forebearers of its Eighth Amendment "failure to narrow" analysis of pecuniary gain as an aggravating circumstance. *Collins*, 754 F.2d at 263-4. *Godfrey v. Georgia* was decided in 1980 and *Zant v. Stephens* in 1983. In essence, the Eighth Circuit holds that in 1975 the Arkansas Supreme Court glimpsed five and eight years into the future, grasped Collins' Eighth Amendment argument that was adumbrated in *Godfrey v. Georgia* and *Zant v. Stephens*, decided the issue and then never mentioned its resolution of this important point in its 1975 opinion, in its 1977 reconsideration of respondent Collins' death sentence or in the two opinions the Arkansas Supreme Court

rendered concerning Collins' claims for post-conviction relief. That the Arkansas Supreme Court did so is incredible.

The Eighth Circuit's resolution of Collins' Eighth Amendment claim rests upon the fiction that the Arkansas Supreme Court actually considered the issue. It is virtually certain that the Arkansas Supreme Court did not do so and could not have done so in 1975 or 1977. This Court should grant certiorari and reverse the Eighth Circuit's decision in order to vindicate the principles set forth in *Wainwright v. Sykes* and *Engle v. Isaac* that were violated by the Eighth Circuit in its resolution of Collins' Eighth Amendment argument. The Eighth Circuit should not be allowed to decide a constitutional claim that was never properly objected to at trial and never squarely presented to any Arkansas court. This Court should also grant certiorari and reverse the Eighth Circuit's decision to prevent the Eighth Circuit from, in the future, using Ark. Stat. Ann. §43-2725 as a syringe to inject nonexistent holdings on the merits into all Arkansas capital murder cases in order to paralyze Arkansas' effort to carry out otherwise lawful capital sentences.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERPRETATION OF PECUNIARY GAIN AS AN ELEMENT OF THE CRIME IN ROBBERY-MURDER CASES ELIMINATES PECUNIARY GAIN AS AN AGGRAVTING CIRCUMSTANCE.

A. The Eighth Circuit's Characterization Of Robbery-Murder Distorts The Law Of Capital Punishment.

In *Collins* the Eighth Circuit held that in capital felony murder cases where robbery is the underlying felony, the use of pecuniary gain as an aggravating circumstance violated the Eighth Amendment. The Eighth Circuit held:

> We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain. A jury which has found robbery murder cannot rationally avoid also finding pecuniary gain. 754 F.2d at 264.

In reaching this conclusion the Eighth Circuit neglects to discuss the Arkansas case law interpreting robbery and cites no authority to justify its conclusion. Apparently the Eighth Circuit feels its conclusion is a universal truth, needing no proof, that applies to every conceivable murder committed in the course of a robbery. The Eighth Circuit's mile-wide, inch-deep analysis of robbery-murder is erroneous due to the Eighth Circuit's failure to examine Arkansas' robbery statute in effect in 1974 when respondent Collins murdered his victim.

In 1974 in Arkansas a murder committed in the course of a robbery was punishable by death. *See* Ark. Stat. Ann. § 41-4702(A) (Supp. 1973). (Under Arkansas' revised criminal code such a murder is still punishable by death. *See* Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977)). In 1974 in Arkansas robbery was defined as " . . . the violent taking of any goods, money or other valuable thing . . . ." *See* Ark. Stat. Ann. § 41-3601 (Repl. 1964). The Arkansas Supreme Court has construed robbery to be aggravated larceny - that is, stealing from a person with the added element of placing the victim in fear. *See Scifres v. State*, 228 Ark. 486, 490, 308 S.W.2d 815, 818 (1958); *Haley v. State*, 49 Ark. 147, 151, 4 S.W. 746, 748 (1886). The Arkansas Supreme Court has stated that the value of the object stolen in a robbery is immaterial and that the requisite characteristic of objects that can be the subject of larceny is whether the object is considered personal property, not whether the object has any pecuniary value. *See Clary v. State*, 33 Ark. 561, 563 (1878); *State v. Soward*, 83 Ark. 264, 103 S.W. 741 (1907) (Arkansas' present robbery statute, Ark. Stat. Ann. § 41-2103 (Repl. 1977) does

not require the state to prove the value of the object of the robbery).

Synthesis of these cases proves that pecuniary gain is not an element of robbery; therefore, pecuniary gain is not an element of the crime in a robbery-murder case. To obtain a murder conviction the state must prove robbery - to do so it need not prove pecuniary gain. Pecuniary gain, clearly seen, is a motive for robbery-murder rather than an element of the crime. Pecuniary gain's true nature, as a motive for robbery-murder rather than an element of the crime, can be seen if one considers hypothetical siblings, one of whom murders the other to take away a family heirloom, prized for its sentimental value, but of no market value whatsoever. In this hypothetical case, murder is committed to facilitate a robbery for gain, but the gain is not pecuniary. This example is somewhat removed from the facts of respondent Collins' case but no more so than the Eighth Circuit's superficial generalizations about robbery-murder.

The Eighth Circuit's mistaken analysis of pecuniary gain, if not reversed by this Court, will be precedent that could be widely followed. Fourteen states have felony-murder capital punishment statutes and also have pecuniary gain or a similarly worded aggravating circumstance that could apply to a robbery-murder [1] Seven of these states have held that pecuniary gain or a similar aggravating circumstance is applicable to murders committed

---

1 Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Louisiana, Mississippi, Nevada, North Carolina, South Dakota, Utah, and Wyoming.

during robberies. [2] If the Eighth Circuit's flawed decision in Collins stands as precedent, the proper development of capital sentencing law in these states could be distorted.

B. The Eighth Circuit Misinterpreted Arkansas Law in Distinguishing *Collins* From *Zant v. Stephens* and *Barclay v. Florida*.

The Eighth Circuit in *Collins* held that the application of pecuniary gain as an aggravating circumstance violated respondent Collins' Eighth Amendment right to be free of the wanton and freakish imposition of the death penalty by a judge or jury acting without statutory guidance. The Eighth Amendment requires that the sentencing body considering the imposition of capital punishment make an individualized determination, taking account of the particular character of the defendant and the particular circumstances of the crime. This Eighth Amendment requirement was established in *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny, notably *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Godfrey v. Georgia*, 446 U.S. 420 (1980).

In 1983 this Court further defined the role that statutory aggravating circumstances are to play in capital sentencing in *Zant v. Stephens*, 462 U.S. 862 (1983) and *Barclay v. Florida*, 463 U.S. 939 (1983). In both cases this Court considered the imposition of a death sentence by

---

2 *See State v. Gretzler*, 135 Ariz. 42, 49-50, 659 P.2d 1, 8-9, *cert. denied*, 461 U.S. 971, *reh'g denied*, 463 U.S. 1236 (1983); *Miller v. State*, 269 Ark. 341, 356, 605 S.W.2d 430, 440 (1980), *cert. denied*, 450 U.S. 1035 (1981); *Raulerson v. State*, 420 So.2d 567, 571 (Fla. 1982), *cert. denied* 463 U.S. 1229, *reh'g denied*, 463 U.S. 1249 (1983); *Pulliam v. State*, 236 Ga. 460, 466-67, 224 S.E.2d 8, 13, *cert. denied*, 428 U.S. 911, *reh'g denied*, 429 U.S. 874 (1976); *Leatherwood v. State*, 435 So.2d 645, 650 (Miss. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1445, 79 L.Ed.2d 772 (1984); *State v. Irwin*, 304 N.C. 93, 107, 282 S.E.2d 439 (1981); *but see Cook v. State*, 369 So.2d 1251, 1256 (Ala. 1979). *See also State v. Knighton*, 436 So.2d 1141, 1156-57 (La. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

sentencing bodies that considered improper aggravating circumstances. In upholding the imposition of capital sentences in both cases, this Court did not isolate the defective aggravating circumstance and then analyze it, as the Eighth Circuit did in *Collins;* instead, this Court considered the aggravating circumstances as part of a whole—that is, as part of a statutory capital sentencing procedure. In both cases this Court determined that despite the presence of a defective aggravating circumstance in the sentencing process, the process as a whole genuinely narrowed the class of persons eligible for the death penalty and reasonably justified the imposition of capital punishment on the defendants in those cases as compared with others found guilty of murder.

Specifically, in *Zant v. Stephens*, this Court held that in states where the sentencing body need only find one aggravating circumstance to impose a death sentence and need not weigh aggravating circumstances against mitigating circumstances to do so, the sentencing body's consideration of one invalid aggravating circumstance, where other aggravating circumstances are properly found, is not a violation of the Eighth Amendment. In *Barclay v. Florida*, this Court held that in states that do not allow the sentencing body to consider nonstatutory aggravating circumstances and that require the sentencing body to weigh aggravating circumstances against mitigating circumstances, the state supreme court is free to apply its harmless error rule to a case where the sentencing body found one nonstatutory aggravating circumstance but also properly found other statutory aggravating circumstances. Taken together, these cases hold that sentencing bodies may find nonstatutory aggravating circumstances and constitutionally impose capital punishment on a defendant if: (1) the nonstatutory aggravating circumstance is not a constitutionally protected activity; (2) the proof of the aggravating circumstance is accurate and is properly before the jury; and (3) the sentencing body properly found at least one other statutory aggravating circumstance.

In *Zant v. Stephens*, this Court noted that Georgia does not require a jury considering imposition of capital punishment to weigh aggravating circumstances against mitigating circumstances. In a footnote this Court noted that Arkansas does require such balancing. *Zant*, 462 U.S. at 873-4, n.12 citing Ark. Stat. Ann. § 41-1302(1) (Repl. 1977). In *Collins* the Eighth Circuit noted that this "balancing" requirement distinguishes *Collins* from *Zant v. Stephens*. *Collins*, 754 F.2d at 266. The Eighth Circuit distinguished *Barclay v. Florida* by noting that the Arkansas Supreme Court does not apply a harmless error analysis, like Florida's supreme court, to capital cases where the jury considered improper aggravating circumstances. The Eighth Circuit stated, "Furthermore, unlike the practice in Florida, if an aggravating circumstance is held invalid for any reason, the Supreme Court of Arkansas does not engage in any sort of harmless-error analysis." *Collins*, 754 F.2d at 267. This statement by the Eighth Circuit is a misinterpretation of Arkansas case law.

The Eighth Circuit relies on *Williams v. State*, 274 Ark. 9, 12, 621 S.W.2d 686, 687, *cert. denied*, 459 U.S. 1042 (1981). In *Williams* the Arkansas Supreme Court relied on *Giles v. State*, 261 Ark. 413, 424-25, 549 S.W.2d 479, 485 *cert. denied*, 434 U.S. 894 (1977) and stated that it will not apply a harmless error analysis where the jury improperly found an aggravating circumstance in imposing a capital sentence. The *Giles* rule was also followed in *Neal v. State*, 274 Ark. 217, 222, 623 S.W.2d 191, 194 (1981) and *Miller v. State*, 280 Ark. 551, 555, 660 S.W.2d 163, 165 (1983).[3] In each of the cases the Arkansas Supreme Court held that the

---

3

In *Giles* the Arkansas Supreme Court held that the jury improperly found that the mitigating circumstance of presence of mental defect did not exist. In *Neal* the Arkansas Supreme Court held that the appellant's trial counsel was ineffective because counsel did not get evidence of appellant's diminished mental capacity before the jury. In *Williams* and *Miller* the Arkansas Supreme Court held that the State failed to prove an aggravating circumstance—that the defendant had committed a prior violent felony.

jury's finding an aggravating circumstance or not finding a mitigating circumstance was evidentiarily defective, not constitutionally defective as the Eighth Circuit found the aggravating circumstance in *Collins*. In *Giles* and its progeny the Arkansas Supreme Court held that it will not apply a harmless error rule where the jury improperly evaluated the evidence pertaining to aggravating circumstances or mitigating circumstances or where evidence of mitigating circumstances was not placed before the jury because of trial counsel's ineffectiveness. The Eighth Circuit misinterpreted these cases in *Collins* when it stated that the Arkansas Supreme Court does not engage in harmless error analysis if the aggravating circumstance is defective for *any* reason; properly interpreted, *Giles* and its progeny show that the Arkansas Supreme Court will not engage in a harmless error analysis if it finds that an aggravating circumstance or lack of a mitigating circumstance is defective for evidentiary reasons—where the Arkansas Supreme Court finds that the jury failed in its truth-seeking duty to properly evaluate the evidence, it will not assume the error is harmless.

In contradistinction to cases in which the Arkansas Supreme Court finds the jury's evaluation of the evidence of aggravating and mitigating circumstances is defective, is the possibility of cases like *Collins* and *Godfrey v. Georgia*, where an aggravating circumstance is held constitutionally defective, irrespective of how a jury applies the circumstance. The Arkansas Supreme Court has never decided such a case because it has never held an aggravating circumstance to be constitutionally defective. However, in *Henderson v. State*, 281 Ark. 406, 664 S.W.2d 451 (1984) the Arkansas Supreme Court indicated that it would affirm capital sentences where one aggravating circumstance is invalid, so long as other aggravating circumstances are properly found. The Arkansas Supreme Court held:

> We do not find that counsel was ineffective in failing to raise the issue of petitioner's mental state in 1963. Even

> if the two robbery convictions were obtained while petitioner was suffering from psychosis, the failure of an aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported by other proof of aggravating circumstances. See *Zant v. Stephens*, ____ U.S. ____, 103 S.Ct. 2733 (1983).

The Arkansas Supreme Court has apparently decided to apply a harmless error analysis to capital sentencing cases where one of several aggravating circumstances is found to be invalid. *Henderson v. State* was not mentioned by the Eighth Circuit in *Collins* even though *Henderson v. State* was decided almost a year before the Eighth Circuit reached its decision.

At any rate, close analysis of *Giles* and its progeny shows that the Eighth Circuit avoided the "application of harmless error analysis" issue when it misinterpreted the Arkansas Supreme Court's holding in *Giles* and its progeny. Proper interpretation of *Giles* and the cases following it suggests that where the Arkansas Supreme Court finds that the jury carried out its duty to seek the truth by correctly evaluating and balancing evidence properly before it, the Arkansas Supreme Court will not reduce a capital sentence. As *Barclay v. Florida* holds, as a matter of Eighth Amendment requirements, the Arkansas Supreme Court could apply a harmless error rule, despite the statutory requirement that the sentencing body weigh aggravating circumstances and mitigating circumstances. The Eighth Circuit's holding that the Arkansas Supreme Court would never do so is based upon a misinterpretation of Arkansas case law and should, therefore, be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

* JOHN STEVEN CLARK
Arkansas Attorney General

BY: CLINT MILLER
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Petitioner

* *Counsel of Record*

APPENDIX A

Carl Albert COLLINS, Appellant,

v.

A.L. LOCKHART, Director of the Arkansas Department of Correction, Appellee.

No. 83-2607.

United States Court of Appeals, Eighth Circuit.

Submitted May 15, 1984.
Decided Jan. 31, 1985.

Rehearing and Rehearing En Banc Denied April 24, 1985.

Lessenberry & Carpenter by Thomas M. Carpenter, Little Rock, Ark., for appellant.

Steve Clark, Atty. Gen. by Victra L. Fewell, Asst. Atty. Gen., Little Rock, Ark., for appellee.

Before McMILLIAN, BENNETT and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

Carl Albert Collins was convicted by a jury of capital felony murder and sentenced to death. The District Court [1]

---

1 The Hon. William R. Overton, United States District Judge for the Eastern District of Arkansas. The District Court's most recent opinion, *Collins v. Lockhart*, No. PB-C-81-271 (E.D. Ark. Nov. 17, 1983), is unreported.

dismissed his petition for habeas corpus, and he appeals. We affirm the District Court's holding that Collins's conviction was valid. But as to the sentence of death, we agree with Collins that one of the aggravating circumstances found by the jury (that the murder was committed for pecuniary gain) duplicated one of the elements of the crime itself (that the murder was committed in the course of a robbery). This double counting of one aspect of the evidence, in our view, violates the Eighth and Fourteenth Amendments, because the pecuniary-gain aggravating circumstance fails to narrow the class of persons already guilty of robbery murder, as required by Supreme Court opinions before the penalty of death may be imposed. Insofar as the District Court rejected Collins's challenge to his sentence, therefore, its judgment will be vacated, and the cause remanded with instructions. On remand, the District Court will enter judgment reducing Collins's sentence to life imprisonment without parole (the only sentence other than death possible under Arkansas law for capital felony murder), unless the State, within such reasonable time as the District Court may fix, commences proceedings to retry the question of Collins's punishment. In any event, the conviction will stand.

Collins was convicted in 1974 in the Circuit Court of Washington County, Arkansas. On direct appeal, the Supreme Court of Arkansas affirmed, *Collins v. State*, 259 Ark. 8, 531 S.W.2d 13 (1975). On certiorari, 429 U.S. 808, 97 S.Ct. 44, 50 L.Ed.2d 69 (1976), the United States Supreme Court vacated and remanded to the Supreme Court of Arkansas for reconsideration in light of *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and companion cases. On reconsideration, the conviction and sentence were again affirmed. 261 Ark. 195, 548 S.W.2d 106 (en banc), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977). A petition for post-conviction relief under Ark.R.Crim.P. 37 was denied. *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182 (per curiam), *cert. denied*, 452 U.S. 973, 101 S.Ct. 3127, 69 L.Ed.2d 984 (1981).

Collins then filed his petition for federal habeas corpus in the District Court. That court, in a thorough published opinion, *Collins v. Lockhart*, 545 F.Supp. 83 (E.D. Ark. 1982), rejected all of Collins's arguments and dismissed the petition. On appeal, we held that the Supreme Court of Arkansas should be given an opportunity to compare Collins's sentence to those imposed in similar cases, in order to determine whether the death penalty in his case was disproportionate. We directed the District Court to hold the habeas petition in abeyance until this proportionality issue could be presented to the State Supreme Court, along with any other federal claims as to which state remedies might not have been exhausted. 707 F.2d 341, 343-44 (8th Cir. 1983). Collins accordingly filed a second Rule 37 petition with the Supreme Court of Arkansas. It was denied, *Collins v. State*, 280 Ark. 312, 657 S.W.2d 546 (1983) (per curiam), the Court stating that "in comparison with [other capital] cases, we find no basis to alter [the] view" that the death penalty was properly imposed on Collins. *Id.* at 315, 657 S.W.2d at 548. Collins then returned to the District Court, which again dismissed his petition. This appeal followed.

Collins's brief in this Court presents four main points: (1) that counsel was ineffective at the guilt stage of this trial; (2) that counsel was ineffective at the penalty stage of his trial; (3) that the death penalty should be vacated because of the "over broad" application of the pecuniary-gain aggravating circumstance; and (4) that the proportionality review conducted by the Supreme Court of Arkansas did not comply with due process. The last three points go only to the validity of the death sentence; only the first argument calls in question the conviction itself.

II.

Collins argues that counsel was ineffective at the guilt stage of his trial in two respects: (1) in not challenging the "death qualified jury,"—an argument that, we have held in *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (en banc),

would have been well taken; and (2) in not requesting that an instruction on the lesser included offense of first-degree murder be given. (Counsel did ask that another lesser included offense, second-degree murder, be submitted, and this instruction was given.) The District Court has persuasively explained why these arguments lack merit, 545 F.Supp. at 88, 89–90, and we add only a few words to its discussion.

[1] As to the lesser included offense of first-degree murder, counsel explained that he made a tactical choice to go to the jury on capital felony murder and second-degree murder only. The submission of a first-degree-murder instruction would have required counsel to discuss the issues of premeditation and deliberation. At the time this case was tried, deliberate, premeditated murder was murder in the first degree. Some special circumstance had to be shown (*e.g.*, killing in the course of robbery) to make the crime a capital one. In order to present the first-degree-murder option effectively, counsel might have actually had to argue to the jury that his client was a deliberate and premeditated killer. We can understand why counsel chose not to do so. Giving his choice the heavy measure of deference it deserves under *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we do not find that counsel made an unreasonable decision.

[2] As to the *Grigsby* point, it has never been raised in the state courts, either directly or in terms of an ineffective-assistance-of-counsel argument. See Stipulation, R. 85-89. [2] Nor could it be raised now. The Supreme Court of Arkansas has now made it quite clear that it will not entertain a second or subsequent petition under Rule 37 unless the first petition was specifically denied without prejudice to filing a subsequent petition. *Collins v. State*, *supra*, 280 Ark. at 315, 657 S.W.2d at 548. Thus, Collins has exhausted his state

2

The reference is to the original file of the District Court in this case, *Collins v. Lockhart*, No. PB-C-81-271 (stipulation filed May 18, 1982).

remedies on this issue, there being no currently available vehicle by which he can now raise the point in the state courts. But since he has failed to raise it there, and since the state courts would treat that failure as a procedural bar to considering the point on its merits now, he is also barred on federal habeas unless he can show both "cause" and "prejudice." We need not discuss the issue of cause, because Collins is utterly unable to show prejudice. We have examined the entire transcript of the testimony at the trial, and we agree with the Supreme Court of Arkansas and with the District Court that the evidence of guilt was overwhelming. As we specifically held in *Pickens v. Lockhart*, 714 F.2d 1455, 1458 n. 2 (8th Cir. 1983), the *Grigsby* argument is therefore unavailing.

III.

[3, 4] We next address the arguments that Collins's counsel was ineffective at the penalty stage, and that the proportionality review conducted by the Supreme Court of Arkansas was legally insufficient. The District Court's discussion of these issues is completely satisfactory. In short, we agree that counsel made a reasonable judgment that no evidence available for introduction at the penalty stage would have helped Collins. The Supreme Court has now held that comparative proportionality review is not constitutionally required, *Pulley v. Harris*, ____ U.S. ____, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), and the Arkansas Supreme Court has, in any event, now given Collins's case this type of review.

IV.

A.

Defendant's final agument is that one of the statutory aggravating circumstances found by the jury in his

case—that the killing was committed for pecuniary gain—is "overbroad," in the sense that it applies to every case of robbery murder (the species of capital felony murder of which defendant was convicted) and therefore fails to distinguish those robber-murderers who deserve the death penalty from those who do not. Thus, the jury is left without sufficient standards to ensure that the death penalty is not freakishly, wantonly, or arbitrarily imposed, in violation of the principles first laid down in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and later elaborated somewhat in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and companion cases.

Collins was charged under Act 438 of 1973, the first capital-punishment statute enacted in Arkansas after *Furman*. Ark. Stat. Ann. § 41-4701 *et seq.* (Supp. 1973). The information, set out in full on page 2 of the record that was before the Supreme Court of Arkansas on direct appeal, charged that Collins killed John Welch "while engaged in the attempt and perpetration of robbery of John Welch . . . ." The jury found Collins guilty of this offense, defined by the General Assembly as capital felony murder, § 41-4702(A), and he is therefore among the class of persons on whom the death penalty may be imposed under state law. In addition, the jury found beyond a reasonable doubt that three aggravating circumstances existed in Collins's case: (1) that Collins had committed a prior crime of violence; (2) that Collins had created a substantial risk of death or serious physical injury to a person other than the victim; and (3) that Collins committed the murder for pecuniary gain. Ark. Stat. Ann. § 41-4711(b), (c), (e) (Supp. 1973). It also found a statutory mitigating circumstance, that Collins was 20 years old at the time the crime was committed. It then became the jury's duty to balance the aggravating and mitigating circumstances against each other and to return a sentence of death only if it found that the mitigating circumstances were not sufficient to outweigh the aggravating circumstances, that the aggravating circumstances were sufficient to justify, beyond a

reasonable doubt, the imposition of the sentence of death, and that the defendant should be sentenced to death. Arkansas, thus, unlike some states, required the jury to balance aggravating and mitigating circumstances before imposing the death penalty. Ark. Stat. Ann. § 41-4710(d)(ii) (Supp. 1973).

Collins claims that every robbery murder is commited for pecuniary gain, that the finding of the statutory aggravating circumstance involving pecuniary gain therefore adds nothing to the finding of guilt of capital felony murder itself, that it is impossible to know whether the jury would have imposed the death penalty had it known that only two valid statutory aggravating circumstances existed, and that his death sentence should therefore be set aside.

[5] The state argues first that this point, which we shall refer to for convenience as the "pecuniary-gain argument," was not properly preserved in the state courts, that no "cause" or "prejudice" has been shown, and that the point is therefore not open for consideration by a federal habeas court. We disagree, substantially for the reasons given in *Ruiz & Van Denton v. Lockhart*, 754 F.2d 254 (8th Cir. 1985). The pecuniary-gain argument was raised by Collins's counsel at trial. R. 256-57. It was not argued in Collins's brief on direct appeal, and the Supreme Court of Arkansas's opinion affirming his conviction does not mention the point expressly, but, as we have explained in *Ruiz*, that Court's regular practice in capital cases is to consider on their merits all points properly raised at trial, whether or not argued in the brief on appeal. This practice was followed here. The Supreme Court said:

> We have, as the statute requires, examined all possible errors that might be prejudicial. Ark. Stat. Ann. § 43-2725 (Supp. 1973). We find that the defendant received a fair trial, free from prejudicial error.

Collins v. State, supra, 259 Ark. at 15, 531 S.W.2d at 17. Thus, the State Supreme Court actually passed on the merits of the federal question that defendant now seeks to present on habeas corpus. Under *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), there is no procedural bar to the raising of the issue on federal habeas, and we therefore now turn to the merits.

B.

Collins's attack on the use of the pecuniary-gain aggravating circumstance breaks down into two subissues: (1) whether pecuniary gain can, as a matter of federal constitutional law, be validly used as an aggravating circumstance when the underlying capital crime is murder committed during the course of a robbery; and (2) if not, whether the sentence of death is nevertheless constitutional or consistent with state law because two unquestionably valid aggravating circumstances were also found by the jury.

1.

We start by laying the state-law predicate against which Collins's argument must be considered. Under Arkansas law as it existed in 1974, when Collins's crime was committed and he was tried, only certain kinds of murder were defined as capital crimes. The traditional offense of first-degree murder still existed, but it was punishable only by life imprisonment. In order to secure the death penalty, the state needed to show one of six specific types of killing. In Collins's case, the crime charged was "the unlawful killing of a human being when committed by a person engaged in the perpetration of . . . robbery." Ark. Stat. Ann. § 41-4702(A) (Supp. 1973). Robbery was one of six felonies listed in this subsection (A). But a finding of killing in the course of a listed felony was not itself sufficient to warrant the imposition of the death sentence. The jury also had to find at least one aggravating circumstance, and this

circumstance had to be one of the six listed in the statute § 41-4711. (As a matter of state law, nonstatutory aggravating circumstances may not be considered, though nonstatutory mitigating circumstances may be. *Giles v. State*, 261 Ark. 413, 420, 549 S.W.2d 479, 483 (en banc), *cert. denied*, 434 U.S. 894, 98 S.Ct. 272, 54 L.Ed.2d 180 (1977)).

[6] In Collins's case, as we have previously noted, three aggravating circumstances were found. One of them was that "the capital felony was committed for pecuniary gain." § 41-4711(e). There is no doubt that this aggravating circumstance duplicates an element of the underlying capital felony, and we do not understand the state to contend otherwise. In 1974, the relevant time for present purposes, robbery was defined as "the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation . . . ." Ark. Stat. Ann. § 41-3601 (Repl. 1964); see commentary to Ark. Stat. Ann. § 41-2103 (Repl. 1977). It is precisely the violent taking of money from the person killed that supplies the element of robbery in the underlying capital felony. Thus, once Collins had been convicted of capital felony murder, specifically charged in the information as murder in the course of a robbery, the jury had necessarily found one aggravating circumstance. In fact, the state made precisely that argument to the jury in the penalty phase of this case.

[THE PROSECUTING ATTORNEY]:

> You are instructed by the law that another aggravating circumstance that you shall consider is whether or not the commission of this particular crime was for pecuniary gain. *You have already determined that yesterday* that this crime was committed by the defendant for money, for pecuniary gain. I submit to you that is the third most aggravating circumstance in this case.

R. 288-89 (Emphasis ours).

[7] The Supreme Court of Arkansas has several times interpreted the statute exactly as it was applied here. The aggravating circumstance of pecuniary gain, the Court has held, is "not limited to a killing for hire, but is also clearly applicable to a murder committed during a robbery." *Miller v. State*, 269 Ark. 341, 356, 605 S.W.2d 430, 440 (1980), *cert. denied*, 450 U.S. 1035, 101 S.Ct. 1750, 68 L.Ed.2d 232 (1981); *Woodard v. State*, 261 Ark. 895, 905-06, 553 S.W.2d 259, 265 (1977) (en banc), *cert. denied*, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979). The use of the pecuniary-gain aggravating circumstance, then, was not a violation of state law, and defendant does not argue that it was.

The question, rather, is whether use of an aggravating circumstance that duplicates an element of crime itself is a violation of the Eighth Amendment, as applied to the states by the Due Process Clause of the Fourteenth Amendment. Two recent Supreme Court opinions, *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion), and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), clearly indicate that such a violation has occurred here. Aggravating circumstances, in order to comply with the Eighth Amendment, must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* 103 S.Ct. at 2742-43 (footnote omitted). An aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime. Aggravating circumstances serve to reduce the danger that the death penalty will be wantonly or arbitrarily imposed, a danger that was uppermost in the Court's mind when *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), was decided. Thus, in *Godfrey* the Court struck down an aggravating circumstance that was so vaguely and generally worded that it failed to narrow the class of persons eligible for the

death penalty. "[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Zant*, 103 S.Ct. at 2743.

We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain. A jury which has found robbery murder cannot rationally avoid also finding pecuniary gain. Therefore, the pecuniary-gain aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others. In effect, a robber-murderer enters the sentencing phase with a built-in aggravating circumstance. Since under Arkansas law and the Eighth Amendment as elaborated by the Supreme Court in *Godfrey v. Georgia*, *supra*, only one aggravating circumstance is required to impose the death penalty, the State has no need to show any additional aggravating circumstances at the sentencing phase. Thus, if no other aggravating or mitigating circumstances are found, the jury is left to decide whether to impose death on a robber-murderer without having made any finding that

narrows the class of those who have committed this death-eligible crime. [3]

Perhaps the best argument in support of the view that the Constitution permits use of pecuniary gain as an aggravating circumstance in this kind of case was made by Chief Judge Eisele in *Woodard v. Sargent*, 567 F.Supp.

3

Although other courts have rejected challenges based on "double counting," these cases did not explicitly address the argument that double counting allows for arbitrary imposition of the death sentence, but rather focus on the argument that double counting imposes a disproportionate punishment on a specific group of death-eligible criminals. See, *e.g.*, *Adams v. Wainwright*, 709 F.2d 1443, 1447 (11th Cir. 1983) (per curiam), *cert. denied*, ____ U.S. ____, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Gray v. Lucas*, 677 F.2d 1086, 1104-05 (5th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S.Ct. 211, 77 L.Ed.2d 1453 (1983); *Dobard v. State*, 435 So.2d 1338, 1344 (Ala.Cr.App. 1982), ____ U.S. ____, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); *Leatherwood v. State*, 435 So.2d 645, 650 (Miss. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1455, 79 L.Ed.2d 772 (1984); *State v. Pritchett*, 621 S.W.2d 127, 140-41 (Tenn. 1981). *But cf. Armstrong v. State*, 399 So.2d 953, 962 (Fla. 1981), *cert. denied*, ____ U.S. ____ 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); *People v. Starnes*, 88 Ill.App.3d 1141, 44 Ill. Dec. 219, 411 N.E.2d 125 (1980); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980); *Glidewell v. State*, 663 P.2d 738 (Okl.Cr. 1983).

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court upheld statutes under which one of the aggravating circumstances repeated one of the elements of the underlying capital offenses. We do not believe that *Gregg* and *Proffitt* are controlling in the present situation. For one thing, there was no opinion of the Court in either case, so it is difficult to know the rationale on which they were based. More fundamentally, the challenge to the Georgia and Florida statutes made in *Gregg* and *Proffitt* was a facial one. They were not challenged as applied to any particular set of facts, and the double-counting argument now advanced by Collins was not made. (Indeed, in *Proffitt v. Wainwright*, 685 F.2d 1227, 1261-69 (11th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), the Court held that one of the aggravating circumstances contained in the Florida statute was unconstitutionally vague even though the Supreme Court had upheld the statute on its face in Proffitt's own case.)

1548, 1575-76 (E.D. Ark. 1983), *rev'd on other grounds*, 753 F.2d 694, No. 83-2168 (8th Cir. January 31, 1985). We think of this argument as a sort of bottom-line proposition. It runs something like this: If Arkansas had defined any deliberate, premeditated murder as capital felony murder, and then prescribed the commission of that murder for pecuniary gain as one of the statutory aggravating circumstances, no one could claim that double counting had occurred. Yet, under such a statutory scheme, a defendant could be sentenced to death who had done no more than what Collins did here. Although this argument is not without appeal, we do not accept it. It is for the General Assembly of Arkansas, not the federal courts, to specify those particular types of killing that it considers worthy of death. Having made its specification, it must then, before the death sentence may validly be imposed, also require that the jury find at least one statutory aggravating circumstance. If an element of the crime is permitted to double as an aggravating circumstance, this requirement is avoided completely. The duplication in this case is a consequence of how the State of Arkansas has chosen to define capital felony murder. That the state could have defined the crime in some other way is beside the point. We take the law of the state as we find it, and to that law we apply the principles of the Eighth Amendment as elaborated by the decisions of the Supreme Court. We conclude that pecuniary gain may not be used as an aggravating circumstance in this case, and that if no other statutory aggravating circumstances had been found, the death sentence would have to be set aside. *Godfrey v. Georgia*, *supra*.

2.

Here, though, other statutory aggravating circumstances were validly found. A number of reported opinions

have upheld the death sentence under such circumstances. [4] All of these cases, we think, are distinguishable from the present one in at least one critical respect. In order to explain why, we must first examine the Supreme Court's recent holdings in *Zant v. Stephens*, *supra*, and *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Stephens clearly sets out the framework against which the issue must be analyzed. There, one of three statutory aggravating circumstances found by the jury was subsequently held invalid, although the other two aggravating circumstances were upheld. "The question . . . whether [the] death penalty must be vacated . . . depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid." 103 S.Ct. at 2736. The particular aggravating circumstance involved in *Stephens* was "a substantial history of serious

---

4

See, e.g., Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2401, 81 L.Ed.2d 357 (1984) (jury found three statutory aggravating circumstances, none of which was attacked as invalid; jury might also have relied on a fourth, nonstatutory aggravating circumstance, but if it did so, only a violation of state law was shown; no federal constitutional attack made on the fourth, nonstatutory aggravating circumstance as such); *Ford v. Strickland*, 696 F.2d 804, 813-15 (11th Cir.) (per curiam) (en banc),*cert. denied*, ___ U.S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983) (arising under Florida law; when one aggravating circumstance drops out, Florida Supreme Court uses, in substance, a harmless-error analysis; such a procedure does not violate the Eighth Amendment); *Williams v. Maggio*, 679 F.2d 381, 386-90 (5th Cir. Unit A 1982) (en banc), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3553, 77 L.Ed.2d 1399 (1983) (arising under Louisiana law; three statutory aggravating circumstances found; Supreme Court of Louisiana reviews the sufficiency of the evidence with respect to only one; procedure held not to violate Eighth Amendment). *But see, e.g., Proffitt v. Wainwright*, *supra*, 685 F.2d at 1268-69 (arising under Florida law; consideration of nonstatutory aggravating factors, in violation of state law, cannot be harmless error) (probably no longer good law after *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), discussed in text below).

assaultive criminal convictions." Georgia Code § 27-2534.1(b)(1). The Georgia Supreme Court had struck down this circumstance as unconstitutionally vague. Thus, the ground of invalidation was not that the aggravating circumstance involved some kind of conduct, for example speech, entitled to affirmative constitutional protection. In *Stephens*, therefore, the Supreme Court held that the rule of *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), providing that a jury verdict based on multiple grounds must be set aside if one of those grounds involved conduct protected by the First Amendment, did not apply. So far, *Stephens* is in point as far as Collins's case is concerned. The pecuniary-gain circumstance presented here does not involve conduct protected by the federal Constitution any more than did the circumstance involved in *Stephens*.

The other portion of the *Stephens* analysis, however, sharply distinguishes that case from this one. The Court paid careful attention to the state-law premises underlying the Georgia Supreme Court's determination that Stephens's death sentence could be upheld on the basis of the two remaining valid statutory aggravating circumstances. In fact, the Supreme Court would not even address the merits of the federal constitutional issue in Stephens's case until the Georgia Supreme Court, on certification from the Supreme Court of the United States, *Zant v. Stephens*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), had specifically discussed the state-law rationale for its holding. That rationale, in substance, was as follows: Under Georgia law, one statutory aggravating circumstance must be found before the penalty of death can be imposed. But the finding of only one such circumstance is sufficient to put a defendant in the death-eligible class. Once in that class, the jury may in its discretion impose the death penalty on the basis of all the facts and circumstances of the case. It is not specifically required to weigh aggravating circumstances against mitigating circumstances. "In Georgia, unlike some other States, the jury is not instructed . . . to